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THE ROLE OF THE COURTS IN THE APPLICATION OF THE REQUIREMENT OF "RESIDENCE" FOR NATURALIZATION

The Immigration and Nationality Act of 1952 requires aliens seeking naturalization to have "resided continuously" within the United States for five years before they are naturalized.[1] The duty to apply this concept of "continuous residence" to the facts as they arise falls to the judiciary, since citizenship, with its accompanying benefits, is a privilege made available by statute and bestowed by court action with the advice of the Immigration and Naturalization Service. The recommendation of the Service may or may not be followed. When an alien contests an adverse recommendation of the Immigration Service, a trial follows, with the Service and the applicant as adversary parties. The ultimate determination of when citizenship should be bestowed rests with the judiciary.

The legislative inclusion of a requirement of five years of "continuous residence" has been viewed as a delegation to the courts of the function of determining in each case whether a petitioner's acts and state of mind during this period are of the sort which satisfy the broad statutory policy of protecting the interests of United States citizens in the "Americanization" of future naturalized citizens.

In 1952, Congress codified all prior acts concerning immigration and naturalization, and added some new provisions, in enacting the Immigration and Nationality Act. The Act retained the old provisions stating that continuous absence from the country for over a year, unless within a specific exception, "shall break the continuity of such residence" as a

1. 66 Stat. 242, 8 U.S.C. § 1427(a) (1952).

matter of law. Absence from six months to a year creates a presumption of a loss of residence, or break in continuity, "unless the petitioner shall establish to the satisfaction of the court that he did not in fact abandon his residence in the United States during such period."[2] In addition, Congress specified for the first time that the alien must be physically present in the United States a total of at least half of the five year period.

The most significant addition made, however, was what appears to be a radical change in the definition of the "residence." Especially important is the direction that "residence" be defined in terms of physical conduct, "without regard to intent."[3] The problem presented is the effect of this new definition on the role of the courts in applying the requirement of "residence."

For many years the courts stated that "residence," as used in the prior act, was to be equated with domicile. Domicile generally has a more fixed meaning: the place assigned by law for a person as his "home."[4] Domicile depends upon a "domiciliary intent," an intent to make the locale one's "permanent" or "indefinite" home or dwelling place.[5] Theoretically, once this intent is established, plus physical presence at the place in question, neither the maintenance of continued presence nor any other contact with the place is essential to the maintenance of domicile if the subjective "domiciliary intent" is maintained continuously. An example is *United States v. Yatsevitch*.[6] Having been assigned to work in England by his American employer, the applicant had to leave this country shortly after he had arrived here and declared his intention of becoming a United States citizen. He subsequently spent his full five years of "residence" living in London. This was due to the fact that his business was unexpectedly prolonged, lasting the entire period. Before leaving, he made tentative arrangements to rent a farm here, and while in London he lived in temporary quarters. Applying a test of domicile, the court ruled that he satisfied the requirements of "residence," stating that "throughout his absence his intention to be an American citizen persisted."[7]

This case illustrates the wide latitude open to the courts through their power to confirm or reject the applicant's petition for citizenship on

2. 66 Stat. 242, 243, 8 U.S.C. § 1427(b) (1952).
3. 66 Stat. 170, 8 U.S.C. § 1101(a)(33) (1952).
4. RESTATEMENT, CONFLICT OF LAWS § 9 (Tent. Draft No. 2, April 22, 1954).
5. This "domiciliary intent" has generally not been deemed essential to a finding of residence.
6. 33 F.2d 342 (D.C. Mass. 1929).
7. The court emphasized the fact that he was very intelligent and a desirable candidate for citizenship. "Why anybody should desire to exclude such a man from citizenship in this country passes understanding." *Id.* at 343.

a ground as nebulous as "residence." Thus the court said in *United States v. Griminger,*[8] that only one rule can be deduced from the authorities: ". . . that the particular meaning of either [residence or domicile] is to be broadened or narrowed to give reasonable effect to the purpose and spirit of the act in which it is used."

The application of the requirement of residence by the courts has indicated a judicial desire that the alien demonstrate during this period of "residence" characteristics consistent with the protection of the interests of the citizens of the United States.[9]

However, "residence" is a highly particularized concept. In its application to the varying fact situations, even within the single field of naturalization, it has taken many forms. Those acts required of a man with a large family and much property to establish and maintain a residence differ from those required of an itinerant bachelor. Thus the application of the test of residence often depends upon the individual means by which the alien may evidence, to the satisfaction of the court, the proper intent, whether it be domiciliary intent, or intent of some other sort.

The courts indicate that, in general, the intent desired might better be characterized as an attitude of "good faith" on the part of the applicant, rather than domiciliary intent. This attitude appears to be essential to satisfy the requirement of residence.[10] The courts verbalize their conclusions in terms of "intent to reside" or "intent to be a citizen." However, the actual state of the petitioner's mind throughout the five year period is obviously beyond discovery. The evidence required by

8. 236 Fed. 285, 287 (N.D. Ohio 1916).

9. In United States v. Martin, 10 F.2d 575 (E.D. Wis. 1925), the court talked about the two requirements of residence and a declaration of intention "to reside permanently in the United States." Martin was denaturalized in this case because he failed to satisfy the court of the second requirement. The court stated that these two requirements ". . . are relevant to more than mere personal history of the applicant during those years; . . . they are intended to support the genuineness of an asserted purpose absolutely to renounce one, and to embrace and bear true faith to another, sovereign allegiance; to aid in proving that attachment to principles, disposition toward good order and happiness, are real and are likely to be permanent. Because of the reciprocal rights and obligations subsisting between governments and those within territorial limits, citizenship, with its allegiance, usually concurs with residence, domicile, or habitation therein; and, where it does not, there is none the less the feeling that *as a matter of civil obligation it should so concur,* thereby, in theory, at least, *to enable* enjoyment of rights and *the discharge of obligations.* These, as suggested, may be respected as elementals implied in the very notions of naturalization—as sovereign requirements exacted in the effort to establish as near as may be equivalence between native-born and adopted citizenship." (Emphasis added.)

10. Some judges have explained that in giving "reasonable effect to the purpose and spirit of the act," they must find that the alien seeks citizenship in good faith before bestowing nationality upon him. See, for example, Petition of Correa, 79 F.Supp. 265 (W.D. Tex. 1948).

the courts to prove this mental attitude indicates that, even though the courts have said they were looking for "intent to reside," they were actually looking for a subjective attitude of good faith on the part of the petitioner.

This element of good faith does not involve morality or good character as such, but seems to be essentially a demonstrated willingness on the part of the petitioner to share in the burdens as well as the benefits of United States citizenship.[11] It is felt that the maintenance of this attitude for at least five years serves to protect United States citizenship from being treated in a superficial way. The courts feel that citizenship should not be too easy to obtain, and that if the applicant has endured some inconvenience before being naturalized, other citizens' interests will be protected from the granting of citizenship to frivolous and irresponsible persons. Thus in *Hantzopoulos v. United States,*[12] petitioner and his wife found it necessary to leave this country because of their poor health. He subsequently had to leave his ill wife in the foreign country in order to return to the United States in time to save his period of residence from being forfeited under the statute. The court, in holding that he had not abandoned his residence by his absence for over a year, stated: "The very fact that he left his wife sick and confined to her bed rather than to forfeit his right to be a citizen of the United States is proof sufficient of his bona fide intention, and it would be inhuman now to deprive him of the right after he had made that sacrifice."[13]

The problem of residence and the determination of the petitioner's good faith arise in two circumstances. The first involves the determination of when a "residence" has been established in the United States. The second, as in the *Hantzopoulos* case, is the question of how the continuity of a residence established in this country may be broken. The factors involved in each are different. One is a question of the sufficiency of presence and the other the necessity of the absence. This results in two different tests, both aimed at determining the degree of the alien's willingness to accept the burdens of United States citizenship with its benefits.

The courts, when they are examining the petitioner's presence in this country to determine the establishment of a residence here, look to his ownership and use of personal and real property and the location of his

11. See Petition of Correa, 79 F. Supp. 265 (W.D. Tex. 1948); United States v. Ginsberg, 244 Fed. 209, 213 (W.D. Mo. 1914). (The residence requirement is imposed "not only as tangible evidence of intent, but in order that petitioner may absorb the spirit of our institutions and do his part in the discharge of reciprocal obligations.")

12. 20 F.2d 146 (M.D. N.C. 1927).

13. *Id.* at 147.

family. These factors indicate a willingness or lack of willingness to "pull up stakes" and to make a sharp break from the applicant's prior residence. In *Petition of Correa,*[14] a Mexican citizen had a job for the five year period as a waiter in El Paso, and lived in a small unfurnished apartment in that city. He left his family and most of his personal property in Juarez, Mexico, right across the border. The house in which his family lived in Juarez was the only one he owned. In ruling that Correa had not established a "domicile" in the United States, the court emphasized these facts in addition to the fact that he spent at least half his time in Juarez when not working in El Paso. However, it was not alleged that he had not been physically present enough of the time in the United States.

In addition, the opinion of the court indicated one interest of United States citizens which a judge more or less unconsciously might try to protect in the course of applying this requirement to the fact situations. The interest protected here seemed to be essentially an economic one—that of preventing money earned in the United States from being regularly spent outside the United States.[15]

Where the question is not the establishment of a residence, but whether the applicant has in fact abandoned his residence in the United States, the emphasis shifts to the question of the voluntariness of the absence. Whether or not it was necessary for the applicant to be out of this country for an extended period of time indicates his willingness to share the burdens with the benefits of United States citizenship. This problem arises only after an extended absence of from six months to a year. After such an absence, under the present act, the petitioner must rebut the presumption that his residence has been abandoned. *Petition of Schneider,*[16] decided in 1927, is a good example. That case concerned two applicants; one was granted citizenship (Schneider), and the other was denied it (Penalosa). Both were absent for a little over two years. Both retained their apartments in the United States. Both took their families with them. Penalosa represented an American company in Venezuela; Schneider stayed with his ill mother until she died. The court

14. See note 7 *supra.*

15. "It was not the intent of Congress and is not the intent of the law to admit a person to citizenship who lives here in order to obtain better wages or improve his financial condition and at the same time raise and maintain a family, educate his children, buy his home and spend his money in a foreign country. This would be a dangerous and unwise precedent that would encourage countless foreigners to file applications without assuming the duties and responsibilities of American citizenship." Petition of Correa, 79 F. Supp. 265, 268 (W.D. Tex. 1948). As other courts have stated, American citizenship cannot be put on and off like a cloak, merely for the purpose of economic gain.

16. 19 F.2d 404 (S.D. N.Y. 1927).

stated that Schneider was compelled by unforeseen events to extend his visit, "and may be said in some sense to have been there only from day to day, ready at any time to return to his apartment in New York when the family situation warranted. . . . Penalosa's stay, on the other hand, was not only deliberate, but was doubtless intended to be for an extended period, while he was engaged in directing the affairs of the bank in Venezuela."[17]

The preceding cases indicate the positive role taken by the courts prior to 1952 in the implementation of the policy of the statute. In the past, the examination of petitioner's "intent," and the determination as to his "good faith," enabled the courts to exercise much discretion. However, as has been mentioned earlier, Congress redefined "residence" in the new act to mean a "place of general abode," and "the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."[18] The new definition must be examined in order to determine its effect on the traditional role of the courts in the application of the requirement of "residence."

Assuming that the courts were ever truly concerned with determining domicile, it would certainly seem that residence, as now used, is no longer synonymous with domicile. Moreover, if intent is ruled out as a factor altogether, nothing would appear to be left in the determination of residence but physical presence. Under that interpretation, the petitioner's purpose in being in one country or another could not be examined, because it would involve an examination of intent. Some early commentators felt this to be the only possible interpretation of the new definition, and concluded that physical presence was the sole test of residence.[19] This interpretation would mean, however, that any absence from the country would be a break in the continuity of residence. Such has not been the case.

The draftsmen's report on this statute contains a significant com-

17. *Id.* at 406. The difference in result between Penalosa's petition and that of Yatsevitch, which was based on essentially the same fact situation, can only be explained by the fact that a test of domicile was applied to Yatsevitch. Penalosa's petition was turned down under a test of "residence."

18. 66 Stat. 170, 8 U.S.C. § 1101(a)(33) (1952).

19. Gordon, *Continuous Residence,* 53 COLUM. L. REV. 451, 454 (1953). Mr. Gordon cites one case, Barber v. Valetta, 199 F.2d 419 (9th Cir. 1952), which he says interpreted "actual residence" (the terminology used by the *Savorgnan* Court) as physical presence. However, this is misleading. The contention in that case was that petitioner's entry was not legal, and that therefore no residence, of any kind, could follow, "actual" or otherwise. The court stated: "We think, however, that the words 'actually resided' must be held to have been used in this section as referring to physical presence within the United States as distinguished from a *lawful* domicile or dwelling therein." (Emphasis added.) *Id.* at 422. The word "actual" "distinguishes that which really and in fact occurred from that which might be described as a legal or lawful condition." *Ibid.*

ment on this section: "This definition is a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in *Savorgnan v. United States,* 338 U.S. 491, 505 (1950)."[20] In that case, the petitioner brought an action for a judgment declaring her to be an American citizen. Five years before, in order to marry a member of the Italian foreign service, she had signed an official Italian form in which she knowingly renounced her American citizenship. She lived with her husband in Italy for the next five years. The question, under the statute, was whether her residence had shifted to Italy for the period she was there. Mrs. Savorgnan claimed, and the District Court so found, that when she went to Italy to live with her husband, "she did so without any intention of establishing a *permanent* residence abroad or abandoning her residence in the United States, or of divesting herself of her American citizenship."

However, the Supreme Court held these facts to be immaterial. "Her intent *as to her 'domicile' or as to her 'permanent residence,'* as distinguished from her actual 'residence,' 'principal dwelling place,' and 'place of abode,' is not material." (Emphasis added.) The Court's statement that the "new [1940] Act used the term 'residence' as plainly as possible to denote an objective fact" is often quoted and has led to the belief that the Court intended to make a broad and unqualified exclusion of intent as an element of residence.[21] However, the full sentence should be considered before determining whether all intent or only certain kinds of intent were meant to be excluded: "In contrast to such terms as: . . . 'domicile,' . . . the new act used the term 'residence' as plainly as possible to denote an objective fact." The court explained: "Where 'permanent residence' was intended, the statute used that term."[22]

It seems clear that the intent which is to be disregarded is a *particular kind* of intent, one that is limited in scope to the facts of that case. There were two kinds of intent at issue in the *Savorgnan* case and the Supreme Court held neither to be an element of residence. First was "domiciliary" intent—intent for permanent or indefinite residence. Second was the party's intent as to the legal consequence of his acts. It was found that Mrs. Savorgnan did not intend to abandon her residence in the United States nor divest herself "of her American citizenship." Her intent was to these matters, as well as whether or not she intended to establish a permanent residence in Italy, was held by the Supreme Court not to be

20. S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952).
21. Grauert v. Dulles, 133 F. Supp. 836 (D.D.C. 1955).
22. *Id.* at 504-05.

material in deciding whether she had actually resided in Italy for the period she had been there.[23]

It has long been held that a person's intent as to the legal result of his action is not material in determining domicile or residence. Therefore, the most significant part of this case is the express revocation of "domiciliary intent" as material to the determination of residence for naturalization. However, as will be shown, the case does not stand for the proposition that all inquiry into the subjective state of the petitioner's mind is to be avoided.

The cases that follow *Savorgnon* generally limit its holding to ruling out domiciliary intent as a factor in determining residence, without excluding an examination of petitioner's present intention, as indicated by extrinsic evidence. They also seem to indicate that the statutory definition taken from the case, although phrased in broad, unqualified language, will likewise be construed in a narrow manner. These later cases in the main involve expatriation as a result of "continuous residence" abroad rather than naturalization based on residence in this country. However, these cases deal with the same test of (three or five years of) "continuous residence" and the same statutory definition taken from the *Savorgnan* case.[24] Therefore, their treatment and discussion of the statutory definition and its relation to the *Savorgnan* case indicate the attitude of the courts toward the broad language of the new definition, and whether or not the courts will, as noted in the draftsmen's reference to the *Savorgnan* case, interpret the definition in the light of that case.

One of the first cases to deal with the *Savorgnan* definition of residence was *Toy Teung Kwong v. Acheson.*[25] In that case, the petitioner was a national of the United States if his father had had ten years of "continuous residence" within the United States. The father's period of residence began in 1938, but in 1946 he returned to China, where he remained until his return to the United States in 1949. The government argued that under the *Savorgnan* test, residence was purely objective, and that therefore his residence was in China for the three years he "lived" there. If this were true, the absence would have broken the continuity

23. The facts of the case can be construed so as to support the conclusion that the only things ruled out by the court were self-serving statements of domiciliary intent, such as Mrs. Savorgnan's. This would leave the Service free to argue against naturalization of a petitioner on the basis of his negative domiciliary intent—an intent always to return to his native country.

24. As was stated in Caolo v. Dulles, 115 F. Supp. 125 (D.C. P.R. 1953), concerning the 1952 Immigration Act: "It is elementary in statutory construction that words used in certain sections of a statute and by it given a specified meaning must be deemed to have the same meaning when employed in other sections of the statute . . ." .

25. 97 F. Supp. 745 (N.D. Cal. 1951).

of the period of residence in the United States. The court said: "Intent is ruled out as a factor." But, as to the test of principal dwelling place: "Implicit in the word 'principal' is a recognition of factual gradations ranging between a transient 'one night stand' and a situation such as existed in the cited case [*Savorgnan*] (where the petitioner actually had no other residence, had severed all ties, and had settled down with her husband in Italy). The court's [in *Savorgnan*] use of 'actual residence' must be viewed from that perspective rather than that contended for by the government in the immediate case. . . . His visit to China was merely for the purpose of attending his mother in her illness."[26] Therefore, he was a resident of the United States during the time spent living in China.[27]

This is the first indication given by the courts that they are going to continue to look for the same subjective factors they have always sought. However, their conclusions will have to be expressed in language different from that used prior to the 1952 definition. This court did give a slight bow in the direction of Congress and the new definition by saying: "Intent is ruled out as a factor." However, in spite of the fact that Toy Teung Kwong's intent was not material, it was decided that he was "residing" in the United States for a three year period in which he lived (with his ill mother) in China.

The second important case in which the *Savorgnan* definition was discussed is *United States v. Karahalias*.[28] The petitioner asked for the reversal of a prior expatriation order, claiming that he was compelled under the circumstances to stay in his native country because of his wife's illness. In granting petitioner's request, Judge Learned Hand commented on the *Savorgnan* case: "There can of course be no doubt that by all this the Court meant to exclude 'intent,' in the sense that the word is a factor in determining domicile."[29] He went on to say, however, that the court must look to the purposes and surrounding circumstances of the person's stay, even if that means including some evidence of the intentions of the petitioner.

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26. *Id.* at 746-47.

27. This is one of the cases described in Grauert v. Dulles, 133 F. Supp. 836 (D. D.C. 1955), as a deviation from the *Savorgnan* holding. The court does not explain this questionable conclusion. One other case cited as a deviation from the *Savorgnan* rule, in Grauert v. Dulles, might be a more accurate designation. In that case, the father left during the tenth year, and the judge in giving his conclusions stated as follows: "I further conclude . . . that such residence was never intended by Lee You [the father] to be any other place than in the United States. . . ." Lee You v. Acheson, 109 F. Supp. 98 (S.D. Tex. 1952).

28. 205 F.2d 331 (2d Cir. 1953).

29. *Id.* at 335.

Thus one year after the passage of the Act, we find the courts limiting the legislative exclusion of "intent" to "domiciliary intent." Obviously, the courts can thereby justify examining all evidence of the purpose and surrounding circumstances of the person's stay as indicative of his "present" intent to reside at one locale or another.

In 1957, the significant case of *Garlasco v. Dulles*[30] resumed discussion of the *Savorgnan* test. This was an expatriation case in which the government contended that Garlasco "continually resided" in Italy for three years, thereby losing his United States citizenship. However, during this three year period of alleged "continual residence" in Italy, he did return to the United States for two and one half months. The government attempted to show that although physically present in the United States, his intent was to return to Italy shortly, and not to reside here. It was proved that less than one month after his arrival, he applied for a passport to return to Italy. The District Court said that his intent was immaterial and that the presumption was that a person's residence went with physical presence. It was further held that the presumption was not rebutted by proof that Garlasco intended to return to Italy shortly. Therefore, the continuity of Garlasco's residence abroad was broken by his trip to the United States and he did not lose his citizenship.

On appeal to the Second Circuit Court, the government altered slightly the presentation of its argument that this evidence should be considered. The United States contended that this evidence indicated that in Garlasco's mind, he had one "place of general abode" for the three year period—Italy. The Court of Appeals agreed that evidence of his intent to return to Italy, when the reason for its importance is phrased in this manner, would be relevant. This would seem to mean that the trial court erred in not considering the evidence of Garlasco's intent and that the government should win its appeal for a reversal. However, intent, at least in one sense of the word—"domiciliary intent"—*has* been rendered immaterial by the new definition. Thus, the appellate court assumed that the trial judge meant "domiciliary intent" when he made the unqualified statement that intent is immaterial, and affirmed the decision of the trial court. In the words of the appellate court, if the trial judge was thinking of intent in terms of "domiciliary intent" or "intent to reside at a place indefinitely," he was correct in ruling it immaterial. However, "the Court's statement might have gone more fully into the sense in which intent was held to be immaterial." For, "the overt act of maintaining a place of general abode would naturally . . . have in it some *subjective* element of purpose of staying at the place *even under the 1952*

30. 243 F.2d 679 (7th Cir. 1957).

Act."[31] (Emphasis added.) Judge Medina, in dissenting from the majority's interpretation of the District Judge's use of the word "intent," said that he felt that "principal dwelling place . . . necessarily involves a probing of his [Garlasco's] intention, and the cases so hold."[32]

This case shows a court wrestling with the word "intent" and its inherent ambiguity. Its conclusion is that the courts are not required by the 1952 definition to change their traditional approach to the determination of "residence."

Thus the role of the courts does not appear to have been appreciably changed by the "radically-new" definition in the 1952 Act. The cases decided before 1952 indicate that much freedom was given to the courts in the examination of factors toward the determination of "residence." Even the test of "domicile" took on new implications when the courts were using it to determine naturalization. When the issue became the establishment of a "residence," the courts' analysis generally concerned itself with the "sufficiency" of petitioner's presence in the United States. When the issue was loss of residence for absence, the voluntariness of the absence—petitioner's purpose in being abroad—was the determinative factor and included a probing into his subjective attitude of "good faith." The courts strongly indicate that the method of analysis has not changed, although the rationale of the opinions will hereafter be expressed in a different terminology in order to conform to the new statutory definition. The desired characteristic of a willingness to accept the burdens of citizenship with its benefits will tend to indicate the party's "principal dwelling place," without being expressed in terms of "domiciliary intent" or "intent to reside." There is no indication that the scope of the courts' analysis, which has always been aimed at the implementation of the statutory policy, has been restricted in any way by the legislative prohibition of the consideration of intent as an element of residence.

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31. *Id.* at 681.

32. *Id.* at 682. There is another case, Chien Fan Chu v. Brownell, 247 F.2d 790 (D.C. Cir. 1957), which indicates the statutory definition will be interpreted to harmonize with the *Savorgnan* case. In this case, petitioner was detained at Formosa for a matter of months before he could get into the United States. The 1952 Act definition was applied, although "residence" in another part of the act was involved, and it was determined, under the new definition, even with the broad exclusion of "intent," that petitioner was a mere sojourner on Formosa and therefore did not establish "residence" there.